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Supreme Court of the United States

OCTOBER TERM, 1959

No. 450

J. ARON & COMPANY, INC.,
Petitioner

versus

MISSISSIPPI SHIPPING COMPANY, INC.,
Respondent

PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner seeks certiorari to review a judgment of the Court of Appeals for the Fifth Circuit, and, in support of its petition, shows:

OPINIONS BELOW and JURISDICTION

The opinion of the Court of Appeals has not yet been reported. That of the District Court is reported at 171 FS 184, 1959 AMC 653. Both opinions are printed in the Appendix hereto.

The Court of Appeals rendered its judgment on August 12, 1959. Jurisdiction of this court lies under 28 USC 1254.

QUESTION PRESENTED

The novel and important question of federal statutory construction presented for review is:

> Is an ocean carrier, required, under the Carriage of Goods by Sea Act, to exercise due diligence "before and at the beginning of the voyage" to make the ship seaworthy, liable for cargo damage caused by unseaworthiness occasioned during a maneuver at her berth preparatory to casting off for the commencement of her voyage?

The Carriage of Goods by Sea Act (46 USC 1300-1315) exempts ocean carriers from liability for cargo damage from a number of causes, including negligence of master or crew in the navigation or management of the ship.

But the carrier is absolutely bound to use due diligence to make the ship seaworthy "before and at the beginning of the voyage" (46 USC 1303(1)(a)).

In the case at bar, the ship, while being maneuvered away from her berth to commence a voyage, was rendered unseaworthy, as the District Court found, by failure of due diligence on the carrier's part.

Without setting aside this finding, the Court of Appeals, Chief Judge Hutcheson dissenting, reversed the judgment against the carrier, on the ground that the failure of due diligence occurred after the "beginning of the voyage".

All three members of the Court of Appeals conceded that there is no direct, dispositive precedent for the case.

The majority of the court held that the phrase "beginning of the voyage" must be given its literal, technical meaning; and that once the ship has commenced a maneuver in connection with her movement away from her berth, the carrier is no longer obligated to exercise due diligence.

Chief Judge Hutcheson, dissenting, felt that the test applied by the majority is too artificial to serve the substantive purposes of the statute at issue; and that the carrier's obligation to use due diligence subsists at least through the actual undocking operation.

Judge Hutcheson's view appears to accord better than that of the majority, with relevant expressions by this court, and by other courts of appeal. The great importance of a resolution of this question to merchant-shipping and marine-insurance interests is obvious.

STATUTE INVOLVED

46 USC 1303(1)(a): "The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to make the ship seaworthy."

STATEMENT OF THE CASE

Having loaded cargo at Santos, Brazil, respondent's Steamship *Del Sud* was made ready for sea. She singled

up her mooring lines, and a local pilot came aboard to unberth the vessel. A tug made up to her starboard quarter, to swing the ship's stern away from the dock into the channel.

The vessel's stern mooring, and some other, lines, but not her bow spring line and her breast line, were cast off. The bow spring and breast lines held the bow of the vessel fast to the wharf as her stern was swung out by the tug.

During this maneuver, while the bow and breast lines remained fast to the dock, the ship's forward quarter rolled against the concrete facing of the wharf, causing a 12-inch fracture in a shell plate at the vessel's bow.

The District Court found, on competent evidence, that the jar of the fracture was felt throughout the ship, and that both the chief engineer and the master were aware of it.

The District Court held that the failure to inspect the results of the blow, and to repair the fracture, constituted want of due diligence on the carrier's part to make the vessel seaworthy; and this finding was accepted by the Court of Appeals.

No such inspection was made, and the ship completed undocking, and then departed on her voyage. Seawater entered the fracture in the hull, and damaged cargo. Cargo interests brought this suit in admiralty, to recover their damages. 28 USC 1333.

The District Court entered judgment in favor of the cargo interests, on the ground that the want of due diligence had occurred "at the beginning of the voyage".

The Court of Appeals reversed, on the ground that the failure of due diligence had occurred after the "beginning of the voyage", when the carrier's obligation in that regard was no longer in force.

Chief Judge Hutcheson dissented, and favored affirmance of the opinion and judgment of the District Court.

ARGUMENT

No light is cast by legislative history on the meaning of the phrase, "before and at the beginning of the voyage", in the statutory provision establishing the carrier's obligation to use due diligence, during that period, to make the ship seaworthy.

However, the phrase is found not only in the United States Carriage of Goods by Sea Act, here at issue, but also in the rules adopted by most of the world's maritime nations at the Hague Conference of 1921 and the Brussels Conferences of 1922 and 1923, and by the implementing statutes adopted by all leading maritime nations.

Commencement of the voyage is also an important concept in the marine-insurance field. The cargo-owner warrants to his underwriter that the insured cargo will be shipped in a seaworthy vessel. The courts, both in

this country and in England, have recognized the interrelation of the warranty of carrier to shipper, and of shipper to underwriter.[1]

There are a number of expressions in opinions and texts discussing both the American and English Carriage of Goods by Sea Acts, as well as the concomitant concept of marine insurance law, which may reasonably be supposed to express correctly the legislative intent as to the proper construction of the statutory phrase at issue.

The Court of Appeals for the Second Circuit has declared authoritatively that the legislative purpose, in cutting off the carrier's due-diligence obligation after the "beginning of the voyage", was "'to relieve the shipowner who has done all that he can do to start off a well-fitted expedition, from liability for damages caused by faults or errors of his shipmen after his ship has gone below the horizon and away from his personal observation". *United States vs New York & O. S.S. Co.*, 216 Fed. 61, 72 (1914), quoting from *Benedict on Admiralty*, section 229.

This court has similarly stated that the scheme of the exculpatory statute is, that the carrier is liable for

[1] See *The Caledonia*, 157 US 124, 131 (1894): "The undertaking as to seaworthiness of the shipowner to the shipper is coextensive with that of the shipper to his insurer"; *The Eugene Vesta*, 28 Fed. 762, 763 (ED Mich.-1886): "The theory of the law is that the implied warranty of seaworthiness shall protect the owner of the cargo until his policy of insurance commences to run; and, as it is well settled that the risk under the policy attaches only from the time the vessel breaks ground, this is fixed as the point up to which the warranty of seaworthiness extends"; *Cohn vs Davidson*, (1877) 2 QB 455, 461.

want of due diligence, while the ship is subject to the owner's supervision from shore, but not while she is in the sole management of her master and crew. *The Isis*, 290 US 333 (1933).

The traditional rule, first expressed by Justice Story, is that "the voyage commences when the ship breaks ground (*i.e.*, is physically separated from her contact with the shore) for the purpose of departure". *The Brutus*, 4 FC 490, 495 (CC Mass.-1815). See also *The Eugene Vesta*, 28 Fed. 762 (ED Mich.-1886).

In *The Willowpool*, 12 FS 96, 100 (SD NY-1935), aff'd, 86 F2d 1002, the court stated that "a voyage commences only when the ship breaks ground or leaves her moorings in complete readiness for sailing and proceeding to sea".

The Newport, 7 F2d 452 (CA 9-1925), involved an incident which, like that at bar, occurred after the ship was ready for sea, the assisting tug had made fast alongside, and the local pilot had come on board. The carrier was denied exoneration because "the vessel's lines were not loose and the voyage had not commenced".

Similarly, Carver states that, under English law, the voyage commences "when the ship starts from whatever were her moorings". *Carriage of Goods by Sea* (Tenth Ed.), 86, citing *The Rona* (1884) 51 LT 28.

In the instant case, the want of due diligence occurred while some of the ship's lines were still fast. So far

from being beyond her owner's shore supervision (much less "below the horizon and away from his personal observation"), she was still tied up to the dock.

So far from having severed her physical contact with the shore, the unseaworthy condition resulted from the ship's rolling against the concrete facing of the wharf while she was in the very act of making ready to "break ground".[2]

Nevertheless, the majority of the Court of Appeals absolved the carrier by giving to the statutory phrase, "before and at the beginning of the voyage", so narrow and technical a construction that it cuts off the carrier's obligation to exercise due diligence at the moment the ship begins preparations for her outward movement, notwithstanding the fact that she is still physically tied to the dock, completely within her owner's shore supervision and control.

This exoneration appears to be in clear conflict with the meaning given to the statutory phrase by this court, and by courts of appeal other than that for the Fifth Circuit, particularly in light of this court's recent holding that the exculpatory statute involved is in derogation of the common law, and must be construed strictly

[2] While this is a point for argument on the merits, it should be noted that the carrier's due-diligence obligation subsists not only "before", but also "at", the beginning of the voyage. The word "at" "is very commonly used . . . in the sense of 'during'". *Jenks vs State*, 39 Ind. 1, 9 (1872). See also *In re Clark's Estate*, 17 Cal.App.2d 323, 61 P2d 1221 (1936); *Hartsett vs State*, 42 Ohio State 568 (1885).

against the carrier. *Herd vs Krawill Machinery Corporation*, 359 US 297 (1959).

The fact that the dissenting judge's views seem to accord with the expressions of other courts of appeal, and of this court, points up the extent of the conflict created by the majority's holding below.[3]

Since the statutory phrase at issue fixes the liabilities of ocean carriers in international trade under the American and foreign Carriage of Goods by Sea acts and the Hague Rules, and of cargo underwriters under well-established and long-standing principles of marine insurance law, resolution of the question raised by the divided decision of the Court of Appeals is of great importance.

[3] "As I see it, the real question is, had the ship left the port of loading, in the legal sense that the voyage had actually begun, the ship was no longer in port, and its fate was no longer in the hands, and under the control, of the shore personnel, but under the control and in the hands of the master. Looked at, as I see it, the law of this case is that the determining question is not how many lines had been cast off and whether the ship had or had not begun the maneuver of getting away from the dock, but whether the evidence supports the finding and conclusion of the district judge, that something occurred to make the ship unseaworthy while it was still in port and, therefore, within the potential control of the shore personnel". Chief Judge Hutcheson, dissenting, *post*, pp. 30-31.

It is respectfully submitted that the case is an appropriate one for exercise of this court's *certiorari* jurisdiction.

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September, 1959

APPENDIX

OPINION OF THE COURT OF APPEALS AND DISSENTING OPINION

BROWN, Circuit Judge: This case presents important questions under the Carriage of Goods by Seas Act (Cogsa), 46 USCA §§1300-1315.[1] The principal question is whether cargo damage, in a legal sense, was caused by an "Act, neglect, or default of the master * * * or the servants of the carrier in the navigation or in the management of the ship," for which liability is excused by Section 4(2)(a) of Cogsa, or was "caused by want of due diligence on the part of the carrier to make the ship seaworthy * * * in accordance with the provisions of paragraph (1) of Section 3" for which liability remains under Section 4(1).[2] This in turn depends largely on

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[1] Cogsa was originally enacted in §§1-16. Sections 1301-1309 correspond to original §§1-9, and §§1310-1315 correspond to original §§11-16. The original sections are used throughout this opinion, but may be readily found in 46 USCA in this way.

[2] The pertinent sections of Cogsa are these.

"SEC. 3. (1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

"(a) Make the ship seaworthy;

"(b) Properly man, equip, and supply the ship;

"(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

"(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried." 46 USCA §§1303.

"SEC. 4(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness, unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool cham-

whether, at the time of the physical event damaging the vessel and later the cargo, the voyage had commenced. The case also points up the sharp distinctions between Cogsa and the Harter Act, 46 USCA §§190-196, while, at the same time, the great similarities of the two Acts.

The facts, set forth in great detail in post-appeal findings and conclusions, have been reported, Steamship Del Sud, E.D.La., 1959, 1959 AMC 653, and need not be repeated here. Those fact or legal-fact conclusions which we reject under the amphibious clearly erroneous concept of *McAllister v. United States*, 1954, 348 U.S. 19, 75 S.Ct. 6, 99 L.Ed. 20, 1954 AMC 1999, we discuss separately.

The cargo damaged was principally coffee loaded in No. 2 lower hold of the SS DEL SUD at Santos September 9 and 10, 1952, and a few cases of corned beef previously loaded in No. 2 lower tween deck at Montevideo and Buenos Aires on September 2 and 5. The vessel arrived next at Rio de Janeiro at noon September 11 departing that night for Curacao, B.W.I., and thence her discharge port of New Orleans where damage was discovered for the first time. Only Santos and pre-Santos cargo is involved.

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bers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 3. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

"(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

"(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship; * * *." 46 USCA §1304.

It is now without dispute that sea water entered through a 12-inch fracture in the bow shell plate just below the lip of overboard discharge soil line which protruded about 2 inches outboard of the surface of the hull plates. The fracture was caused by the pressure of the ship's weight bearing on this small protuberance in momentary contact against the concrete face of the dock which, imperceptibly but now significantly, inclined at an angle of 7° 35' toward the vessel. The lip or drip pad of the overboard discharge line, at the vessel's loaded draft, was then about 2 feet above the water level and some 4 feet below the level of the dock. This was at the flaring contour of the bow so that the shell plating was in a plane in the shape of a spheroid. Contact between the dock and the ship's port bow was an intentional part of the traditional and purposeful maneuver of simultaneously undocking and turning the vessel around for departure from the port of Santos.

At 2133 hours September 10, the vessel, moored as customary, port side to the dock, was made ready for sea and for her customary maneuver away from the dock. She singled up her mooring lines and a local Santos pilot came aboard to unberth the vessel. Her engines were put on stand-by at 2157 hours. The Tug NEPTUNE made fast on the starboard quarter with a hawser in order to swing the stern of the DEL SUD away from the dock out into the channel to permit her to turn about in a counterclockwise manner. By 2208 hours the stern mooring lines and all lines other than the bow spring line and breast line were cast off. The

bow spring line and breast line were held fast to the dock in order to hold the port bow at the dock while the stern was brought out into the channel by means of the Tug NEPTUNE hauling on the hawser at right angles to the vessel. Between then and 2214 hours the ship's engines were maneuvered at various speeds. At 2214 hours the engines were put full astern and at that moment the two remaining lines were cast off. It was during these maneuvers between 2208 and 2214 hours that the port shell plating of the DEL SUD, just forward of the point where the curvature of the hull begins at No. 2 hold, rolled in contact with the concrete facing of the dock. This was in accordance with the plan followed by the DEL SUD and her sister ship on many previous occasions on departing from Santos. The fracture resulted because the drip pad lip, from the peculiar combination of water level draft and trim, happened momentarily to take the full force of the vessel as she was rolling against the concrete dock.

It is now certain that as the DEL SUD left the Port of Santos she bore an open wound in a cargo space. She was, therefore, unseaworthy in fact. The shipowner contends that this unseaworthiness was caused, and therefore excused, by a Section 4 act or error in the management or navigation of the vessel. Cargo does not really dispute this. For Cargo agrees that, unlike the former days of the Harter Act when its Section 3 (46 USCA §192) error in management exception was confined to events occurring after the commencement of the voyage, The Newport, 1925, 9 Cir., 7 F.2d 452, 1925 AMC 1193; The J. L. Luckenbach, 1933, 2 Cir., 65 F.2d

570, 1933 AMC 980, affirming 1 F.Supp. 692, 1933 AMC 105, Cogsa's Section 4(2)(a) is now unconditional both as to due diligence and in point of time. The John Miller (*Isbrandtsen Co. v. Federal Insurance Co.*), 113 F.Supp. 357, 1952 AMC 1945, affirmed per curiam, 2 Cir., 1953, 205 F.2d 679, 1953 AMC 1033. Gilmore & Black Admiralty, Ch. III, Part II, 119 et seq., esp. §§3-25, 3-29, 3-30 (1957). Consequently had the Santos coffee been immediately damaged by the inrush of water, the Section 4 defense would have been absolute whether the ship was deemed to be on her voyage, making ready for her voyage, or simply undocking preparatory to commencing her voyage.

What Cargo contends—and has so far successfully maintained—is that the unseaworthiness resulting from the act or error in management and navigation existed prior to the time the voyage commenced, and that, consequently there was a failure to perform the Section 3 duty to exercise due diligence "before and at the beginning of the voyage" to make the ship seaworthy. Cf. The Newport (*G. Amsinck & Co. v. Pacific Mail Steamship Co.*), 9 Cir., 1925, 7 F.2d 452, 1925 AMC 1193; and see Knauth, Ocean Bills of Lading 202 (1957). On this approach the Cogsa Section 4 exemption is lost, not because the event occurred prior to the commencement of the voyage, but rather because the result of it, fully manifest before the commencement of the voyage, made the ship unseaworthy. Of course, an ingredient in that thesis is that the master knew, or ought to have known, of the damage to the DEL SUD while the vessel was yet

in Santos so that his failure to inspect and repair was a want of due diligence. If the main premise is correct —that is, the noncommencement of the voyage—the owner would bear the consequences of the master's failure since the duty to exercise due diligence rests upon all and is nondelegable. *International Navigation Co. v. Farr & Bailey Mfg. Co.*, 1901, 181 U.S. 218, 21 S.Ct. 591, 45 L.Ed. 830.

The factual basis for this theory comes down to the proposition that the voyage could not yet have commenced because the vessel was still partly at the dock since a breast and spring line were still made fast. Support of a legal nature to that highly artificial approach is thought to be found in the Section 3 phrase "*before* and *at* the beginning" of the voyage, as though blending these two prepositions expands a "beginning" from some precise moment to a sort of continuing transitional state.

The use of "*before* and *at*" does not make the commencement of the voyage—whenever it is—any less a beginning. When the voyage begins, it is the voyage, and not the beginning of it, which continues. The dual reference is to make doubly sure that with respect to cargo then being loaded the vessel must be seaworthy at the time of the receipt of cargo and must continue in that state until the ship sails. That the duty reaches backward from commencement does not make it reach forward, as the Act prescribes that the latest point of performance is *at* the beginning. The voyage must have some place (and time) of beginning. After that, it is not the beginning, but the voyage itself which transpires.

In the light of these principles a majority of the Court therefore concludes that the voyage had commenced at the time the wound to the ship's side was sustained.

We need but briefly indicate our views. In a very real sense the voyage had begun. The ship had no further purpose at the dock. She was made ready for sea. She was being turned around for the purpose of leaving. The lines to the dock were fast not to keep her there, or to continue her stay at the wharf. They were there solely as an essential step in her navigational maneuvering. They were no less vital than the hawser to the straining tug off the starboard quarter. The ship's engines were actively maneuvering to accomplish the swing and officers and men were stationed for simultaneous undocking and departure. The ship was literally and figuratively in the sole command of the master on the bridge.

That this may pose some conceptual difficulties in supposititous cases is not significant. By its nature the problem must be one of fact, resolved on the peculiar facts of the specific episode. Just where, short of the combination of facts presented here, the voyage must be deemed *not* to have commenced, we need not determine. The fact that in our research, and that of the skilled advocates in this cause, no one has found a case like this one attests that in the two and one-half decades of Cogsa, and nearly seven of the Harter Act, there has been no compelling need for an abstract statement of the principle in point of *time* or *place*.

We see nothing contrary to our conclusion in The Willowpool (*John W. Higman & Co. v. Pool Shipping Co.*), S.D.N.Y., 1935, 12 F.Supp. 96, 1935 AMC 1292. The ship there, unlike the DEL SUD whose purpose was to swing and continue uninterruptedly out of the Port of Santos toward Rio de Janeiro, shifted from a dock to a mooring berth, during which time the collision damage was sustained. When she later departed on her voyage which then began for the first time she was unseaworthy. What we decide is consistent with the ancient observation of Judge Story that "* * * the voyage commences when the ship breaks ground for the purpose of departure * * *." The Brutus, C.C.D.Mass., 1815, 4 Fed. Cases 490, 495 (No. 2060); and see also The Buckingham (*Steamship Buckingham Co. v. Pacific Transport Co.*), E.D.Pa., 1904, 129 Fed. 975, 976; *Steamship Wellesley Co. v. C. A. Hooper & Co.*, 9 Cir., 1911, 185 Fed. 733, 738.

Once it is determined that the hole in the ship's side occurred after the voyage had begun within the meaning of Cogsa Section 3, the failure of the master to inspect and repair damage at Santos was likewise an error in navigation and management and also excused under Section 4.[3] This makes it unnecessary for us to pass upon the findings that by reports the master received from the engine room, which he ignored or rejected, and sensations of a collision felt by others on the vessel,

[3] In the same category is the charge and finding that more or different fenders should have been used. We regard the findings clearly erroneous which hold substantially that the plan to undock and swing the ship by rolling her bow against the dock made damage inevitable so that the ship was unseaworthy by contemplating that maneuver, or doing so in her then trim and draft.

the master ought to have known that the impact against the dock was extraordinarily severe and likely caused damage.

But we must consider further the activities at Rio de Janeiro. On this short voyage (arriving Rio noon September 11, departing late that night), the No. 2 bilge showed 5 inches of water at 0800 hours September 11. The bilges were previously dry. During her brief stay there, the bilge showed 10 inches in No. 2. In retrospect, especially in light of the bilge soundings running as high as 24 inches on the voyage from Rio to Curacao, it is likely that the water then in the bilges at Rio had come in through the fracture of the hull. But the ship officers, unaware of this fracture, concluded that the five and ten inch soundings on September 11 were due to heavy rains at Santos. Cargo argues that with the soundings on September 11, plus what he ought to have known from the occurrence of the night before at Santos, the Master was charged with knowledge of what he would have seen had a close inspection of the bow near the waterline been made. Consequently, it is urged, there was an independent failure to exercise due diligence to make the vessel seaworthy prior to departure from Rio regardless of the origin of the initial hull damage. The contention is indeed a relevant one, since it seems overwhelming from the bilge soundings that it was the working of the vessel in the seas after departure from Rio that caused the entry of substantial amounts of sea water into No. 2 hold. In point of fact it was more important to close up the hole at Rio than it had been at Santos.

But at Rio, as Cargo frankly recognizes, the duties were quite different. As to Santos, Montevideo and Buenos cargo, the voyage had long since begun. With respect to each of those cargos "the time which should be considered the commencement of the voyage, when the vessel should have been placed in a seaworthy condition" has been stated in the simplest and plainest terms by the Second Circuit in The Walter Raleigh (*Union Carbide & Carbon Corp. v. United States*), 2 Cir., 1953, 200 F.2d 908, 1952 AMC 618. "The precedents and reason leave no doubt that as to a particular cargo it should be when that cargo is lifted * * *. The Southwark, 191 U.S. 1, 13, 24 S.Ct. 1, 48 L.Ed. 65; *May v. Hamburg-Amerikanische Packetfahrt Aktiengesellschaft*, 290 U.S. 333, 342, 54 S.Ct. 162, 78 L.Ed. 348; The President Polk, 2 Cir., 43 F.2d 695, 696, 697; The J. L. Luckenbach, D.C.S.D.N.Y., 1 F.Supp. 692, 707, affirmed 2 Cir., 65 F.2d 570." See also The Havana (Atlantic Gulf & West Indies S.S.Line), S.D.N.Y., 1942, 45 F.Supp. 244, 245, 1942 AMC 595; The Oritani (Atlantic Fruit Co.), D.C.Pa., 1929, 40 F.2d 522, 1930 AMC 230, affirmed, 3 Cir., 1931, 54 F.2d 1075; The Steel Navigator, 2 Cir., 1928, 23 F.2d 590, 1928 AMC 388; Gilmore & Black, Admiralty 130 (1957).

At Santos, and at Montevideo and Buenos Aires, the Master stood as any other servant of the shipowner and any failure to exercise due diligence to make the vessel seaworthy with respect to cargo loaded at each respective port would be chargeable to the owner. But at subsequent ports and with respect to cargo previously loaded, the acts of the Master (and crew members) are

those of management and navigation excusable under Section 4 unless, as is not the case here, the particular activities are those concerning the care, custody, receipt and delivery of cargo under the principles discussed in The Germanic (*Oceanic Steam Navigation Co. v. Aitken*), 1905, 196 U.S. 589, 25 S.Ct. 317, 49 L.Ed. 610; The Titania (*Leon Bernstein Co. v. Wilhelmsen*), 5 Cir., 1956, 232 F.2d 771, 1956 AMC 754. Knauth, Ocean Bills of Lading 196-208 (1953); Gilmore & Black, Admiralty §3-29 (1957).

Thus, in an early case Judge Addison Brown declared that failure to make repairs at an intermediate port was an error of management. "If any error was committed in this respect, I think it was an error of judgment. It was an error, moreover, pertaining to the 'management' of the ship; since the question arose after the voyage had commenced at a port of distress, far from the home port, and away from any supervision by the owners, and was wholly subject to the master's determination." The Guadeloupe, S.D.N.Y., 1899, 92 Fed. 670, 671. This case was cited with approval in *United States v. New York & O. S.S. Co.*, 2 Cir., 1914, 216 Fed. 61, 71-72, cert. dismissed, 1915, 238 U.S. 646, 35 S.Ct. 794, 59 L.Ed. 1504. "But it seems to us that, the vessel being seaworthy when she began her voyage, the failure to make inspection at an intermediate port, if such an inspection ought to have been made, must be regarded as a fault in management of the ship under the third section of the Harter Act. The Guadeloupe, (D.C.) 92 Fed. 670 (1899)." The court there gave its approval to the dramatic language then contained in

Benedict, Admiralty §229, that the Harter Act was "intended to relieve the shipowner who has done all that he can to do to start off a well-fitted expedition, from liability for damages caused by faults or errors of his shipmen after his ship has gone below the horizon and away from his personal observation." 216 Fed. 61, 72. Much the same was repeated in The Milwaukee Bridge, 2 Cir., 1928, 26 F.2d 327, 330, 1928 AMC 1063. "Moreover, such an act as failure to inspect the hold at St. Thomas, even if negligent, has been held by this court to be a fault in management of the ship, excusable under Section 3 of the Harter Act."

This principle, indeed these very cases, received the express approval of the Supreme Court in The Isis (*May v. Hamburg-Amerikanische Packetfahrt Aktiengesellschaft*), 1933, 290 U.S. 333, 345, 54 S.Ct. 162, 78 L.Ed. 348, 1933 AMC 1565. "If the management of the ship is in the hands of master and crew, he [owner] will be relieved of liability for supervening losses, provided only that his [owner's] own duty has been fulfilled at the beginning. If the term of management is over and the ship is in his hands again, the duty is renewed.

"The question then is when management begins and ends. * * * Upon arrival at a port of call, the master is negligent in his inspection of the ship or its equipment. Liability for the damage will not be chargeable to the owner, for this again is a fault of management. The Steel Navigator (C.C.A. 2d) 23 F. (2d) 590; The Milwaukee Bridge (C.C.A.2d) 26 F. (2d) 327, 330; *United States v. New York & O.S.S. Co.* (C.C.A.2d) 216 Fed.

61, 71; *Jay Wai Nam v. Anglo American Oil Co.* (C.C.A. 9th) 202 Fed. 822; The Guadeloupe (D.C.) 92 Fed. 670. Cf. Carver on Carriage by Sea, 7th ed. § 103e, collating the decisions."

The Court spelled this out in more detail. "If the master of the Isis had acted on his own responsibility at Bremen in sending the vessel on, the fault would have been negligence in management, or so we may assume. But that is not what happened. The owner intervened by its marine superintendent, who was sent from Hamburg to Bremen to inspect the disabled vessel and determine what to do. He consulted with the master and others. The decision in the end was his. * * * If reasonable diligence would have shown that the vessel was unseaworthy when he sent her on her way, there was something more than an error in navigation or management on the part of master or of crew. There was a failure by an owner to fulfill the condition on which immunity depended." 290 U.S. 333, 334. Later on the Court again emphasized the intervention, and its legal significance, of the owner's shore staff who took full command of the situation at the Port of Bremen. "Here is a case where master and crew have surrendered their management and have made appeal to the owner to resume control himself. Response to that appeal destroys the continuity of the voyage, as if it were broken into stages. * * * An owner intervening in such circumstances must be diligent in inspection or forfeit his immunity. Negligence at such a time is not the fault of servants employed to take the owner's place for the period of a voyage. It is the fault of the

owner personally, exercising his own judgment to determine whether the voyage shall go on." 290 U.S. 333, 346.

Presumably to satisfy these principles, Cargo proposed, and the Court adopted verbatim, a finding and legal conclusion that because the owner maintained a shore establishment in Rio "which performed all of its operating functions in that port * * *" the management of the DEL SUD "was not solely in the hands of her master and crew as it is on the high seas" so that "the vessel was in respondent's hands once again, and the duty to exercise due diligence was renewed."[1]

But we reject this finding as clearly erroneous. The record does not sustain either a finding, or an implied finding, that there was a shore staff competent to, or charged with responsibility of, making inspections and arranging for or superintending the repair. Nor does

[1] This is found in Conclusions of Law XI:

"Respondent maintained a shore establishment in Rio de Janeiro which performed all of its operating functions in that port. When the DEL SUD entered Rio in her damaged condition on the northbound leg of Voyage 23 her management was not solely in the hands of her Master and crew as it is on the high seas. The vessel was in respondent's hands once again, and the duty to exercise due diligence was renewed. It was incumbent upon respondent to exercise due diligence to make the DEL SUD seaworthy before and at the beginning of her voyage from Rio de Janeiro to New Orleans by way of Curacao. Respondent's failure to conduct a survey or any examination of the hull of the DEL SUD prior to its departure from Rio on the northbound leg of Voyage 96, in spite of the impact with the dock at Santos and in spite of the fact that she was taking water on the voyage from Santos to Rio de Janeiro (see The *Willoupool*, 12 F. Supp. 96), renders respondent liable for subsequent damage to the cargo loaded at Buenos Aires and Montevideo, even though the DEL SUD was seaworthy upon departure from these ports. (*The Isis*, 290 U. S. 333, 1933 AMC 1565.)"

it show any effort, as in The Isis, of the shore staff to supplant or supersede the ship officers and crew. Indeed, the record is uncontradicted that no one aboard the vessel had any idea that the ship then bore the wound in her port bow. Had the law charged the owner with the legal consequences of it, the ignorance of master and officers of the damage might, as Cargo vigorously contended, been imputed to them. But this does not prove the contrary, namely, that the ship's company stood aside while the port establishment took over. Indeed, the only basis for the finding is a literal use of answers to a pretrial interrogatory which proved, at most, only the nature of the port staff, not any of their actual activities, and none whatsoever with respect to this call of the DEL SUD on this voyage.

Interrogatory 12 stated:

"Describe the shore establishments maintained by respondent at the various ports of call which were touched on voyage 36, including a statement of the number of personnel at each establishment, and an explanation of the function of the various departments in each establishment."

The answer as to Rio de Janeiro was as follows:

"At the ports of Rio de Janeiro, Buenos Aires and Santos, respondent's vessels are serviced by Delta Line, Inc. It is a wholly owned subsidiary of respondent and functions in the three mentioned ports in the capacity of husbanding agent, booking agent, stevedores and stevedoring supervisor and passenger agent. It performs all other functions relating to the operations of respondent at those ports.

"At Rio de Janeiro Delta Line, Inc., employs 16 persons directly. The stevedoring superintendent is employed on a per ton fee basis. * * * The function of the various departments of Delta Line, Inc., at each port is as follows:

"Rio de Janeiro Accounting 12

* * *

Administrative 2 (manager and assistant manager.)

"The manager is responsible for the proper functioning of all his departments and, additionally, handles all contact work with shippers and receivers in connection with the booking of cargo, settlement of claims, etc. The assistant manager relieves the manager of such part of his responsibi-

The result is that Cargo must fail on both counts. The initial damage was occasioned as a result of error in navigation. The voyage had begun and there was not a failure of the master to exercise due diligence at the Port of Santos to make the vessel seaworthy. If the damage sustained by the cargo as a result of wetting after leaving Rio may be treated as proximately resulting from a failure to inspect and repair at Rio, that error, too, was one in the management of the vessel unaffected by any act of the owner through its shore staff. The decree for the cargo must be reversed and rendered for a dismissal of the libels.

REVERSED AND RENDERED

HUTCHESON, Circuit Judge, Dissenting:

A careful consideration, in the light of the pleadings, the opening statements of counsel, and the evidence which was substantially not in dispute, of the majority's sweeping out of hand rejection of the district judge's clearly, precisely, and, I think, correctly stated findings and conclusions, has left me with the firm conviction that it is not the district judge who has been misled by able and earnest briefing, suggestion, and ar-

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lities as the manager may find it advisable to delegate such responsibilities.

"Traffic 2 (freight agent and passenger agent)

"* * *

"Stevedoring Superintendent—1

"At this port the stevedoring superintendent is employed on a per ton fee basis. His duties are to supervise the loading and discharging of cargo. * * *"

gumentation, but the majority, and that, on this record, it is this court's clear duty not to reverse but to affirm the judgment.

Fully realizing that, except as my reasons for making my choice commend themselves to reasonable and informed minds, my statement that I agree with the district judge adds nothing to his discredited and rejected findings, subtracts nothing from those of the majority, which in turn I reject as unwarranted and ill-advised in law, I shall, as briefly and succinctly as I can, and with as few weasel words as may be, state my reasons for my fear, indeed my firm belief, that the opinion of the majority is based on such "a highly artificial approach" to the construction of the Carriage of Goods by Sea Act as to violate with respect to it the basic principles of statutory construction, nowhere better stated than in Heydon's case.[1]

[1] "In Heydon's Case in 1584, after all the Barons of the Exchequer had argued in open court, it was unanimously resolved by Sir Roger Manwood, Chief Baron, and the other Barons of the Exchequer:

'That for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered. 1. What was the common law before the making of the Act? 2. What was the mischief and defect for which the common law did not provide? 3. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth? And 4. The true reason of the remedy? and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the act, pro bono publico.' 3 Co. 7a." A Case for Three Judges, Harvard Law Review, March, 1934, p. 798.

It is, therefore, impossible for me to accept the conclusion of the majority that the findings and conclusions of the district judge must be rejected out of hand as clearly erroneous, and that this court, entirely uninfluenced by them, can subject the record to a substantially de novo consideration and analysis, and, based thereon, make contrary findings of its own.

It seems plain to me, on the contrary, that the facts as facts are by and large undisputed, and that, where they are not, they fully support the findings of the district judge. It is clear, too, I think, that where the findings are in part concerned with inferences from facts, there is a sufficient, indeed a very strong case for the fact findings and conclusions of the district judge, that there was negligence in handling the ship in connection with the undocking (1) in not making an entry in the log of the occurrence of striking the dock with great and unusual force and (2) in not instituting an inquiry before departure from the port as to its effect, upon the seaworthiness of the vessel, and the care and protection of the cargo.

I must confess that when I come to consider what I regard as the crux of the case, the legal situation at Santos, under the Carriage of Goods by Seas Act, 46 U.S.C.A., 1300-1315, and to state what I believe to be the law of the case, I find the situation most unsatisfactory. This is not because I have difficulty in concluding on principle what the decision should be. It is because, and only because, the controlling factor here is the correct construction of the applicable statute and

there is no controlling decision precisely in point with the facts of this case. In short, neither the counsel, the district judge, nor the majority has been able to point to a single authoritative decision on facts like these, and I have found none for myself.* The district judge, having found and held, upon the undisputed evidence, that the ship was rendered unseaworthy by the collision with the dock, and, with ample support in the evidence that the carrier had not exercised due diligence to make it seaworthy, disposed of the case with confidence as a case of liability under Sections 3 and 4(1) of the Act, while the majority, of the view that, once maneuvering to depart the port had begun, what occurred thereafter to render the ship unseaworthy and what was done about it was of no moment because, by Sec. 4(2)(a),* carrier and ship were as completely exempted from liability as though the injury to the ship had occurred at sea.

For myself, I think it clear that the case may not be decided by how many lines had or had not been cast off but only by determining which in principle is the dominating portion of the statute here, the general or enabling provisions of Sections 3 and 4, imposing the duty of diligence to make the ship seaworthy, that the carrier shall be bound to exercise due diligence to make the ship seaworthy "before and at the beginning of the voyage", that is before it leaves the port, or the ex-

* "(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

"(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship; * * *" 46 USCA Sec. 1304.

ceptive or limiting provision of Sec. 4(2)(a), that neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from "(a) Act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship." In my opinion, the majority, in paramounting Section 4(2)(a), has set sail on the wrong course, while the district judge, in paramounting Section 3, has taken the right one. Instead, therefore, as the majority seems to think of the district judge's position representing "a highly artificial approach", I think the shoe is on the other foot and that it is the position of the majority which is the "highly artificial" one.

While it is true that maneuvering was well under way and most of the lines had been cast off, it is also true that some had not been, and, if the question of line casting is at all controlling, and I definitely think it is not, it seems to me that, unless all lines are off, it is the same for our purpose as if none were. In short, if the ship is to prevail under the line casting theory, which the majority seems to espouse, the proof must show that the act making the ship unseaworthy occurred at least after all the lines were cast off, while for cargo to prevail, it is sufficient if at least one remains uncast.

I, however, do not subscribe to either of these views. I think the question of what lines were or were not made fast, what were loose, is wholly artificial and immaterial. As I see it, the real question is, had the ship left the port of loading, in the legal sense that the

voyage had actually begun, the ship was no longer in port, and its fate was no longer in the hands, and under the control, of the shore personnel, but under the control and in the hands of the master.

Looked at, as I see it, the law of this case is that the determining question is not how many lines had been cast off and whether the ship had or had not begun the maneuver of getting away from the dock, but whether the evidence supports the finding and conclusion of the district judge, that something occurred to make the ship unseaworthy while it was still in port and, therefore, within the potential control of the shore personnel, and that the circumstances were such as to constitute it negligence not to make or cause to be made an inspection before leaving the port to determine whether the ship was seaworthy, so that the case is controlled by Sections 3 and 4(1) of the Act and not by Sec. 4(2)(a).

In my opinion, the question admits of only one answer, that given by the district judge, and the view of the majority, that the injury was caused by an error in navigation and management, from the consequences of which the vessel was completely exonerated, is, upon the record in this case itself, completely erroneous, and I deprecate and dissent from the judgment of reversal.

JUDGMENT OF THE COURT OF APPEALS

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

IN CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court for the cargo in this cause be, and the same is hereby, reversed and rendered for dismissal of the libels;

It is further ordered, adjudged and decreed that the appellees, Zander and Company, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Hutcheson, Circuit Judge, Dissenting."

ORDER

The two libels in this cause having been consolidated for hearing by the District Court and for briefing, argument and decision on appeal, and this Court thereafter, on motion of counsel for appellees, Zander & Company, Inc., et al., having granted a blanket extension of time to all appellees until October 2, 1959 within which they might either apply for rehearing of the decision and judgment entered as of August 12, 1959, or alternatively for a stay of the judgment of this court pending their application for writ of certiorari, and

It appearing that appellee, J. Aron & Company, Inc., does not now desire either to apply for a rehearing or for a stay of the judgment of this court on its own separate application for a writ of certiorari;

IT IS NOW ORDERED that this judgment reversing and rendering this cause as to appellee, J. Aron & Company, Inc., for dismissal of its libel, be issued forthwith separately as to that appellee, and that the clerk of this Court issue a certified copy hereof to the clerk of the District Court as soon as practicable.

FINDINGS AND CONCLUSIONS OF THE DISTRICT COURT

CHRISTENBERRY, J.

The foregoing matters having been consolidated for trial, and having been tried to the Court without a jury, the Court having heard evidence and the arguments of proctors, and having taken time to consider the matters, hereby makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

I

Respondent, Mississippi Shipping Company, Inc., was and still is a corporation duly organized under the laws of the State of Louisiana, owning and operating a number of vessels engaged in the carriage of cargo on the high seas, having an office and place of business in the Hibernia Bank Building in the City of New Orleans, State of Louisiana. Respondent is the owner of the SS DEL SUD, operating the said vessel in the common carriage of merchandise for hire between, among others, the ports of Buenos Aires, Montevideo, Santos, Rio de

Janeiro, Curacao, and New Orleans. The DEL SUD is a large ocean liner with over 90 passenger accommodations and six cargo holds, with a length of 494 feet 7-7/16 inches, breadth of 69 feet, gross tonnage of 10,073, and net tonnage of 5,543.

II

Each of the libellants has the legal status ascribed to them in the libels and has the interest in the various shipments ascribed to them in the libels. Each of the shipments referred to in the libels was carried by the respondent pursuant to the terms of its regular bill of lading issued by its authorized agents, incorporating the provisions of the U.S. Carriage of Goods by Sea Act, 1936. Each of the said shipments was delivered to the respondent at the port of loading in good order and condition and each of the said shipments sustained sea water damage sometime during the voyage from Santos to New Orleans.

III

a) Voyage 36 of the DEL SUD began when she departed the port of New Orleans on August 14, 1952. The chronological order of the voyage, and the date and time of arrival at and departure from each port of call, was as follows:

Voyage 36 Southbound

New Orleans	Departure	3:04 P.M.	Aug. 14, 1952
St. Thomas, Virgin Is.	Arrival	2:51 P.M.	Aug. 18, 1952
St. Thomas	Departure	7:05 P.M.	Aug. 18, 1952
Rio de Janeiro	Arrival	1:50 P.M.	Aug. 27, 1952
Rio de Janeiro	Departure	4:59 P.M.	Aug. 28, 1952
Santos	Arrival	7:19 A.M.	Aug. 29, 1952
Santos	Departure	3:55 P.M.	Aug. 30, 1952
Montevideo	Arrival	8:57 P.M.	Sept. 1, 1952
Montevideo	Departure	8:06 P.M.	Sept. 2, 1952
Buenos Aires	Arrival	7:52 A.M.	Sept. 3, 1952

Voyage 36 Northbound

Buenos Aires	Departure	3:15 P.M.	Sept. 6, 1952
Santos	Arrival	7:44 A.M.	Sept. 9, 1952
Santos	Departure	10:14 P.M.	Sept. 10, 1952
Rio de Janeiro	Arrival	12:00 Noon	Sept. 11, 1952
Rio de Janeiro	Departure	11:04 P.M.	Sept. 11, 1952
Curacao, B.W.I.	Arrival	10:30 A.M.	Sept. 20, 1952
Curacao, B.W.I.	Departure	12:31 A.M.	Sept. 21, 1952
New Orleans	Arrival	8:00 A.M.	Sept. 25, 1952

b) The amount of cargo loaded and discharged at each port and the change in draft resulting therefrom on Voyage 36 was as follows:

Port	Tons Cargo		Draft		
New Orleans	Loaded 1350		18'0"F.	22'0"A.	20'02"M.
St. Thomas	None	**Arr.**	17'04"F.	21'06"A.	18'05"M.
	(1795 bbls. fuel)	**Dep.**	17'08"F.	21'08"A.	18'08"M.
Rio de Janeiro	Loaded 166	**Arr.**	16'06"F.	21'00"A.	18'09"M.
	Discharged 109	**Dep.**	16'02"F.	21'06"A.	18'10"M.
Santos	Loaded none	**Arr.**	16'02"F.	21'06"A.	18'10"M.
	Discharged 52	**Dep.**	16'00"F.	21'06"A.	18'09"M.
Montevideo	Discharged 268	**Arr.**	16'07"F.	22'07"A.	19'07"M.
	Loaded 158	**Dep.**	17'06"F.	21'04"A.	19'05"M.
Buenos Aires	Discharge 1087	**Arr.**	17'10"F.	21'02"A.	19'06"M.
	Loaded 1324	**Dep.**	18'00"F.	21'08"A.	19'10"M.
Santos	Discharged 139	**Arr.**	17'00"F.	22'00"A.	19'06"M.
	Loaded 4459.8	**Dep.**	25'03"F.	26'05"A.	25'10"M.
Rio de Janeiro	Discharged 12.5	**Arr.**	25'00"F.	26'04"A.	25'08"M.
	Loaded 853.8	**Dep.**	26'00"F.	27'06"A.	26'09"M.
Curacao	Discharged None	**Arr.**	24'08"F.	25'08"A.	25'02"M.
	Loaded (10,624 bbls. fuel)	**Dep.**	26'10"F.	27'08"A.	27'03"M.
New Orleans	Discharged	**Arr.**	26'07"F.	28'05"A	27'06"M.

c) The draft of the DEL SUD at Santos on Voyage 36 and on prior voyages during the previous year was as follows:

	ARRIVAL			DEPARTURE		
Voy. 30						
SB	21'10"F.	25'10"A.	23'10"M.	19'04"F.	24'08"A.	22'00"M.
NB	16'06"F.	21'04"A.	18'11"M.	20'08"F.	25'10"A.	23'03"M.
Voy. 31						
SB	20'02"F.	26'08"A.	23'05"M.	18'06"F.	26'00"A.	22'07"M.
NB	17'02"F.	21'04"A.	19'03"M.	19'06"F.	23'04"A.	21'05"M.
Voy. 32						
SB	19'04"F.	25'04"A.	22'04"M.	17'06"F.	26'00"A.	21'09"M.
NB	16'02"F.	20'02"A.	18'02"M.	18'00"F.	22'10"A.	20'05"M.
Voy. 33						
SB	16'03"F.	22'05"A.	19'04"M.	15'00"F.	22'00"A.	18'06"M.
NB	17'10"F.	21'04"A.	19'07"M.	17'06"F.	23'08"A.	20'07"M.
Voy. 34						
SB	18'01"F.	25'06"A.	21'10"M.	17'00"F.	24'06"A.	20'09"M.
NB	15'04"F.	21'04"A.	18'04"M.	18'00"F.	22'06"A.	20'03"M.
Voy. 35						
SB	17'04"F.	20'08"A.	19'00"M.	16'04"F.	19'08"A.	18'00"M.
NB	15'00"F.	22'02"A.	18'07"M.	17'02"F.	24'00"A.	20'07"M.
Voy. 36						
SB	16'02"F.	21'06"A.	18'10"M.	16'00"F.	21'06"A.	18'08"M.
NB	17'00"F.	22'00"A.	19'06"M.	25'03"F.	26'05"A.	25'10"M.

IV

On September 2 at Montevideo, and September 5 at Buenos Aires, the cases of corned beef which were ultimately damaged by sea water were loaded aboard the DEL SUD and stowed in the lower 'tween deck of the No. 2 hold.

On September 9 and 10 at Santos, the bags of coffee which were ultimately damaged by sea water were loaded aboard and stowed in the No. 2 lower hold and in the square of the hatch between the No. 2 lower 'tween deck and lower hold.

V

Upon arrival at Santos on September 9, 1952, the DEL SUD moored portside to her customary berth at Dock 15. The facing of this dock is of concrete. At 2133 hours on September 10, 1952, after loading heavily, the DEL SUD made ready for her customary maneuver away from the dock. She singled up her mooring lines and a local Santos pilot came aboard to unberth the vessel. Her engines were put on standby at 2157 hours. The Tug NEPTUNE made fast on the starboard quarter of the DEL SUD with a hawser in order to swing the stern of the DEL SUD away from the dock and out into the channel to permit her to turn about in a counter-clockwise manner. To accomplish this maneuver, the stern mooring lines were cast off beginning at 2208 hours and the bow spring line and breastline were held fast to the dock in order to hold the port

bow at the dock while the stern was brought out into the channel by means of the Tug NEPTUNE hauling on the hawser from the tug's stern at about right angles to the ship. At 2214 hours the engines of the DEL SUD were put astern. During the said maneuver, when the port shell plating of the DEL SUD just forward of where the curvature of the hull begins at No. 2 hold rolled in contact with the concrete facing of the dock, the lip of an overboard discharge line, which stood out two inches from the shell plating, pressed against the concrete dock, causing a fracture in the shell plating about 12 inches in length and 1/2 inch in width just below the protruding lip of the overboard discharge line. The fracture was located in the fifth strake below the sheer strake and about two feet above the water with the vessel trimmed as she was for departure from Santos, in the way of No. 2 lower 'tween deck on the port side. It resulted from the pressure of contact between the hull and the concrete dock due to the unusually heavy load and deep draft of the vessel.

VI

It was customary for two cork fenders about 18" in length and 18" in diameter to be used over the side of the DEL SUD during the undocking maneuver at Santos to prevent damage to both the vessel and the dock. However, during the undocking of the vessel on Voyage 36 at Santos, in spite of the fact that even the use of two fenders could not prevent some points of contact, only one cork fender was used and it was

accordingly impossible to avoid contact between the hull and the concrete facing of the dock as the hull rolled against the dock when the after end of the vessel was maneuvered out into the channel.

VII

The crack in the hull of the DEL SUD described in Paragraph V occurred before the vessel left the dock at Santos and while her forward lines were still made fast to the mooring facilities on the dock.

VIII

The impact which caused the damage to the hull was unusual and severe and the shock or vibration was felt by personnel aboard the DEL SUD. Chief Radio Officer Theodore Hergenrader was on deck near the Radio Room at the time of impact and to him the impact felt like the DEL SUD had hit something solid. He could feel the vibration and to him it was similar to the jar he felt aboard the DEL SUD when a lumber schooner hit the DEL SUD a glancing blow. Ship's Physician William A. Love was in the deck cafe at the time of impact and felt the vibration and bump which seemed to him as though the vessel had been forced against the dock. Chief Engineer John L. Cullen was in the engine room at the time of impact and felt the vibration from the impact which he thought had been caused by the ship striking a crane on the dock when the bow came around.

IX

The regular master of the DEL SUD was Captain Williams. On Voyage 36, Adin Tooker acted as Relief Master and was on the bridge at the time of impact with the dock and knew at that time that an impact between the vessel and the dock of unusual severity had occurred. In spite of such knowledge, no effort was made to determine whether the DEL SUD had sustained damage to her hull as a result of the impact until the vessel returned to New Orleans.

X

Upon experiencing the impact of the ship with the dock at Santos, Chief Engineer Cullen felt that the impact was severe enough to warrant entry of the incident in the engine room log, but before doing so called the bridge on the telephone to ascertain what entry was being made in the bridge log. He spoke to Junior Third Mate Dobson. Dobson in turn advised Captain Tooker of Cullen's inquiry and in reply Captain Tooker stated that no entry was to be made in the bridge log, which information was transmitted over the telephone to Cullen by Dobson. These conversations took place while the forward lines of the DEL SUD were still made fast to the dock at Santos. In order to avoid a discrepancy between the bridge log and the engine room log, Cullen decided to make no engine room log entry of the incident and none in fact was made in the bridge log or the engine room log.

XI

On the night of September 10, 1952, upon departure from Santos, the DEL SUD was loaded to the deepest draft she had ever been when leaving this dock at Santos, drawing 25 feet 3 inches forward and 26 feet 5 inches aft. The water level was 7 feet 5/8 inches below the top of the dock when the DEL SUD prepared to depart from Santos. The DEL SUD's draft, at that tidal stage, brought the lip of the overboard discharge on the port side 2 feet 8-7/8 inches above the water and the lip was then 4 feet 3-3/4 inches below the top of the concrete dock. With the vessel loaded as heavily as she was, and with the water level as it was, respondent's customary undocking maneuver made damage to the hull of the DEL SUD extremely probable if not inevitable.

XII

Although no seawater could or did enter through the crack in the DEL SUD's hull as she lay in the harbor at Santos because the crack was approximately two feet above the water line, as the DEL SUD put to sea for Rio de Janeiro seawater began to enter through the crack due to the swells of the sea, normal roll of the vessel, and buildup of water at the bow, all of which caused the crack to be submerged at times, and seawater continued to enter the No. 2 hold during the remaining stages of her voyage until arrival at New Orleans, Louisiana. The entrance of seawater resulted in damage to much of the cargo loaded at Montevideo, Buenos

Aires, and Santos and stowed in the No. 2 lower hold and lower 'tween deck.

XIII

At 0800 hours on September 11, 1952, while approaching Rio de Janeiro, a sounding of the bilge well below the No. 2 hold of the DEL SUD disclosed 5 inches of water. Prior to Santos, the bilge had been dry. At 1200 hours on September 11, 1952, the DEL SUD arrived in Rio de Janeiro, Brazil, and moored port side to Dock No. 7. The afternoon sounding of the bilge well below the No. 2 hold of the DEL SUD disclosed 10 inches of water.

XIV

After loading cargo at Rio de Janeiro, the DEL SUD departed at 2304 hours on September 11, 1952, for Curacao, B.W.I. without respondent's having surveyed the vessel's hull to determine why she was taking water. On the voyage from Rio de Janeiro to Curacao, there was a maximum of 24 inches of water in the bilge well of No. 2 hold, and on the voyage from Curacao to New Orleans, there was a maximum of 8 inches of water in the bilge well of the No. 2 hold. The bilges were pumped continuously commencing on September 12, and in spite of pumping the water reached the maximums herein stated. It is obvious that water was entering the lower 'tween deck and draining down into the lower hold throughout the various stages of the voyage after the vessel departed Santos. It is impossible to

determine what degree of damage was caused to the cargo during the various stages of the voyage from Santos to Rio de Janeiro, from Rio de Janeiro to Curacao, and from Curacao to New Orleans.

XV

In the ports of Rio de Janeiro and Santos, respondent's vessels are serviced by Delta Line, Inc., a wholly-owned subsidiary of respondent, which functions in the capacity of husbanding agent, booking agent, stevedores, stevedoring supervisor and passenger agent and performs all other functions relating to the operations of respondent at those ports.

XVI

While the primary cause of the damage of cargo was the vessel's departure from Santos in an unseaworthy condition, the failure of respondent to take proper steps in the port of Rio de Janeiro to discover and repair the damage to the hull of the DEL SUD resulted in further damage to the cargo in the No. 2 lower hold and 'tween deck, since, in spite of continuous pumping of the bilges, the water therein reached its maximum height of 28 inches after the DEL SUD left Rio de Janeiro for Curacao on the northbound voyage.

CONCLUSIONS OF LAW

I

The subject matter of this litigation, a claim for damage to cargo while on the high seas, is within the

admiralty and maritime jurisdiction of the Court, 28 USC 1333.

II

The carriage of cargo involved in this litigation was pursuant to the U.S. Carriage of Goods by Sea Act of April 13, 1936, 46 USC 1300-1315.

III

Section 3 of the U.S. Carriage of Goods by Sea Act requires the carrier to exercise due diligence to make the ship seaworthy "before and at the beginning of the voyage". A breach of this obligation, which proximately results in damage to cargo, renders the carrier liable to cargo for the damage. The carrier must not only discharge the obligation to exercise due diligence to make the ship seaworthy at all times before the beginning of the voyage, but also must exercise due diligence to make the ship seaworthy at and during that interval of time which may be said to comprise the actual "beginning of the voyage."

IV

A "voyage", as the term is used in Section 3 of the U.S. Carriage of Goods by Sea Act, does not begin, insofar as a particular cargo is concerned, until the vessel departs from the port at which the particular cargo is lifted and loaded aboard the vessel. As to the cargo which was loaded at Santos, respondent had the obligation to use due diligence to make the ship seaworthy

before and at the beginning of the voyage from Santos. *Union Carbide & Carbon Corp. v. United States*, 200 F. 2d 908 (2 CCA 1952).

V

A voyage begins only when the vessel breaks ground or leaves her moorings in complete readiness for sailing and proceeding to sea. *The Willowpool*, 12 F. Supp. 96. *The Newport*, 7 Fed. 2d 452. When the damage occurred to the DEL SUD she had not left her moorings at Santos in complete readiness for sailing and proceeding to sea since her bow spring line and breast line were still made fast to the mooring facilities of the dock at Santos. Therefore, the vessel was damaged and rendered unseaworthy before the voyage from Santos had begun and was not seaworthy at the beginning of the voyage within the meaning of Section 3 of the U.S. Carriage of Goods by Sea Act.

VI

Insofar as cargo loaded at Santos is concerned, the carrier failed to exercise due diligence to make the DEL SUD seaworthy before and at the beginning of the voyage since the occurrence of the unusual and severe impact when the DEL SUD rolled against the dock at Santos, which rendered the vessel unseaworthy, was known to responsible personnel aboard the DEL SUD, including the navigating personnel on the bridge, before the voyage had begun, and the obligation imposed by Section 3 of the Carriage of Goods by Sea Act re-

quired that a diligent effort be made to determine whether the vessel had sustained damage.

VII

Respondent's breach of the obligation imposed by Section 3 of the Carriage of Goods by Sea Act was the proximate cause of the damage to cargo loaded on board the DEL SUD at Santos.

VIII

Even before the undocking maneuver began, respondent had breached the obligation imposed by Section 3 of the Act by loading the DEL SUD so heavily at Santos that the resulting pressure on her hull during the undocking maneuver made hull damage extremely probable if not inevitable. To so load the vessel as to make hull damage during a customary maneuver inevitable, or even probable, constituted a failure to exercise the degree of diligence required by Section 3 of the Act. *Interlake Iron Corporation v. Gartland SS Co.*, 121 F. 2d 267 (6 CCA 1941).

IX

Respondent had an obligation to anticipate and guard against the type of damage which the vessel sustained, and its failure to do so, either by providing for the use of a sufficient number of adequate fenders, and instructing its personnel accordingly, or if the fenders could not give the necessary protection to the hull during the customary undocking maneuver; then by providing for

the use of an undocking maneuver which did not place undue strain on the hull of the vessel, constituted a lack of due diligence to make the vessel seaworthy before and after the beginning of the voyage from Santos. *The Fred W. Sargent*, 32 F. Supp. 520.

X

The obligation to exercise due diligence which is imposed by Section 3 of the Act is not limited by the provisions of Section 4, (2) of the Act. If any action or inaction on the part of the carrier or its agents which might otherwise be excused under Section 4(2) of the Act renders the vessel unseaworthy before or at the beginning of the voyage, there is a breach of the obligation imposed by Section 3 if the resulting unseaworthiness could have been discovered by the exercise of due diligence and was not discovered, and the carrier is responsible for the resulting damage to cargo.

XI

Respondent maintained a shore establishment in Rio de Janeiro which performed all of its operating functions in that port. When the DEL SUD entered Rio in her damaged condition on the northbound leg of Voyage 36, her management was not solely in the hands of her Master and crew as it is on the high seas. The vessel was in respondent's hands once again, and the duty to exercise due diligence was renewed. It was incumbent upon respondent to exercise due diligence to make the DEL SUD seaworthy before and at the beginning of her voyage from Rio de Janeiro to New

Orleans by way of Curacao. Respondent's failure to conduct a survey or any examination of the hull of the DEL SUD prior to its departure from Rio on the northbound leg of Voyage 36, in spite of the impact with the dock at Santos and in spite of the fact that she was taking water on the voyage from Santos to Rio de Janeiro (see *The Willowpool*, 12 F. Supp. 96), renders respondent liable for subsequent damage to the cargo loaded at Buenos Aires and Montevideo, even though the DEL SUD was seaworthy upon departure from these ports. (*The Isis*, 290 US 333, 1933 AMC 1565.) Since the DEL SUD took substantial quantities of water in the No. 2 hold on each leg of the voyage between Santos and New Orleans, it is impossible to determine what portion of Buenos Aires and Montevideo cargo was damaged, and to what extent, on the voyage from Santos to Rio, the voyage from Rio to Curacao, and the voyage from Curacao to New Orleans, the carrier bears the burden of segregating the damage for which it is responsible from the damage for which it may be excused, and failing to carry this burden, is responsible for the salt water damage to all cargo in the No. 2 hold, whether loaded prior or subsequent to the damage incurred at Santos which made the vessel unseaworthy. *The Vallescura*, 1934 AMC 1573.

XII

Libellants are entitled to recover from respondent for the amount of salt water damage sustained by the shipments loaded aboard the DEL SUD at Buenos Aires, Montevideo and Santos and stowed in the No. 2 hold.